

Purpose: This draft document is intended to guide EPA and Ohio staff in future discussions. Upon conclusion of these discussions R5 (NPDES Programs Branch and Office of Regional Counsel) in consultation with the appropriate divisions in OW and OECA, will identify any unresolved issues of concern and, in conjunction with Ohio Departments of Agriculture (ODA) and Environmental Protection (Ohio EPA) determine if any statutory, regulatory or other document changes are necessary prior to EPA action on the Request to Transfer.

Ohio is seeking to split the administration of the NPDES program between ODA and Ohio EPA. It is EPA's understanding that ODA is seeking to administer (1) the NPDES program for discharges of pollutants from concentrated animal feeding operations (CAFOs) and (2) a stormwater NPDES program applicable to livestock operations. Ohio EPA will retain NPDES jurisdiction over non-CAFO programs and a stormwater program applicable to agriculture operations without livestock.

Section 402(n)(3) of the Clean Water Act (CWA) provides that the Administrator may approve a partial permit program covering administration of a major category of discharges if such program represents a complete permit program and covers all of the discharges under the jurisdiction of a department or agency of the State. 40 CFR 123.1(g)(1) provides that NPDES authority may be shared by two or more state agencies but each state agency must have statewide jurisdiction over a class of activities or discharges.

EPA looks forward to further discussion with Ohio regarding ODA's proposed program. The following topics are presented to begin this discussion. The citations to Ohio statutes and administrative code or other documents, and related statements in this paper, reflect EPA's current understanding of Ohio's proposed administration of the NPDES program by both Ohio EPA and ODA.

Topics for Discussion:

1. Regulation of non-manure pollutants: A complete NPDES program must have the legal authority to implement and be administered in conformance with federal requirements to issue permits for the discharge of "pollutants." Section 903.08(G) of the Ohio Revised Code (ORC) provides ODA with the authority to include terms and conditions in permits that implement requirements needed to meet water quality standards and national effluent standards, however other provisions in Chapter 903, provisions in Chapter 901:10 of the Ohio Administrative Code (OAC), and in supporting documents submitted in the 2015 Request to Transfer, focus on "manure." These include, e.g., 903.10(E)(4) (permit limits for manure), 901:10-3-03 through 06 (effluent limits for manure at large CAFOs), 901: 10-3-07 (CAFO designations based on manure discharges), and 901: 10-5-04(E)(5) (penalties for manure violations). Further discussion is needed regarding pollutants not associated with manure, including pollutants in construction and industrial stormwater.

2. Best professional judgement and water quality based NPDES permit terms and conditions: In accordance with 122.44 and 125.3, a state NPDES program must be able to establish technology-based effluent limitations in NPDES permits based on effluent guidelines promulgated by EPA. If an effluent guideline is not appropriate or one has not been promulgated, a state program must be able to impose technology-based permit limitations on a case-by-case basis using the requirements and methodologies established in 125.3. A state NPDES program must also have authority and regulations to establish conditions in a NPDES permit to accomplish several water quality objectives as set forth in 122.44.

Further discussion is needed regarding the resources and technical expertise ODA has to administer these types of permit requirements and what role Ohio EPA will have in the development of such terms and conditions in NPDES permits.

3. Stormwater: Further discussion is needed regarding the delineation of Ohio's NPDES stormwater program between state agencies.

a.) Although 903.08 (C)(1) and 901:10-3-11(B) provide that no person shall discharge stormwater from an animal feeding facility without a NPDES permit, it is not clear whether ODA's rules allow issuance of a NPDES permit to the operator of the construction activity where that operator is not the owner or operator of the AFO. Neither the Ohio Attorney General's Statement of Legal Authority (AGS) nor the Program Description (PD) include discussion of ODA issuing NPDES permits to construction site operators. In contrast to 122.21(b), 901:10-1-02(D)(3) does not appear to impose a mandatory duty on the operator to obtain a permit. Further discussion is needed regarding ODA's authority and procedures to issue NPDES permits to an operator for discharges of stormwater from construction activity.

b.) The definition of stormwater at 901:10-3-11(A)(15) excludes "construction site dewatering." This appears to conflict with the federal effluent guidelines for construction and development because the federal guidelines require authority over various wastes at construction sites including construction site dewatering, see 450.21(c). Further discussion is needed regarding how Ohio will administer the NPDES program for construction site dewatering.

c.) Sections 901:10-3-11(D)(1) and 901:10-1-02(D)(4) appear to provide conflicting time periods for submission of permit applications for discharges of stormwater. Further discussion is needed regarding this potential conflict.

d.) Further discussion is needed regarding ODA's ability to require operators to obtain a NPDES permit if the Director determines that stormwater controls are needed for discharges based on wasteload allocations included in an EPA-approved Total Maximum Daily Load.

e.) Confirm whether Ohio's supporting documents include an analysis of ODA rule conformance with Section 402(p) of the CWA, federal rules in 122.26 and in Part 450, and ODA's authority and program to develop effluent limits for stormwater discharges associated with construction activity and other industrial activities using best professional judgement.

4. General Permits: Section 903.03(E) gives the director the authority to issue general permits to operate in lieu of individual permits to operate. Section 903.08(F) authorizes the director to issue general NPDES permits in lieu of individual NPDES permits. Section 901:10-1-02(A)(2) provides that a person who seeks coverage by a general permit must refer to rules 901:10-3-11 and 901:10-4-01 to 901:10-4-05 for a general permit to operate, general NPDES permit or a general NPDES stormwater permit. Consistent with the Ohio Revised Code, 901:10-1-02(A)(2) identifies two types of general permits, a general permit to operate and a general NPDES permit. Section 901:10-1-02(A)(2) further distinguishes a general NPDES stormwater permit from other types of general NPDES permits.

a.) Chapter 901:10-4 uses the terms *general permit*, *general permit to operate*, *NPDES general permit to operate*, and *general NPDES permit*, but does not provide definitions for all these terms,¹ and these terms appear to be used inconsistently throughout 901:10-4. Section 901:10-4-01(A) does provide a definition of “general permit to operate or general permit”, however, this definition is unclear because the referenced definition for “facility” is not included in the administrative code. Further discussion is needed to identify which requirements established in 901:10-4 apply to ODA’s authority to issue general permits to operate pursuant to 903.03(E) and which requirements established in 901:10-4 apply to ODA’s authority to issue general NPDES permits. Further discussion is also needed to determine whether the requirements established in 901:10-4 are applicable to NPDES general stormwater permits.

b.) Further discussion is needed on how ODA plans to issue NPDES general permits. The PD, p. 5, identifies a list of types of permits that ODA will issue. Included in the list are general permits to operate that will include state operating requirements, and “if applicable”, NPDES requirements for operations and NPDES requirements for industrial stormwater. Except for some site-specific plans that are submitted with a notice of intent or as a condition of a general permit, e.g., nutrient management plans, stormwater pollution prevention plans, a NPDES general permit should include all terms and conditions that apply to the specific category of dischargers eligible for coverage under the NPDES general permit. Including NPDES requirements “if applicable” appears inconsistent with the federal program for NPDES general permits.

5. Compliance and Enforcement: Further discussion is needed regarding ODA’s authority and regulations applicable to information gathering, entry to premises, conducting inspections, and recovery of penalties. Many of ODA regulations seem to be focused on “permitted” or “applicant” CAFOs/AFOs and on violations of permit conditions and discharges of manure.

a.) Chapter 903.12 sets forth ODA’s authority to enter any public or private property to make investigations and inspections. Section 901:10-5-02(A)(1) entry procedures are limited to premises of an applicant for a permit or a permittee. Section 901:10-5-03(B) provides that representatives of the department shall conduct inspections and determine if the owner or operator is not in compliance but, 901:10-5-03(A) limits the applicability of 901:10-5-03(B) to only CAFOs, CAFFs and major CAFFs. Additional discussion is needed regarding ODA’s enforcement procedures, similar to those established in 901:10-5-03(B)-(E), for discharges of pollutants from facilities that are not CAFOs, CAFFs or major CAFFs.

b.) Section 901:10-5-02 establishes a right of entry for inspections and investigations of the permit premises. Section 901:10-3-10(H) establishes inspection and entry conditions for NPDES permits. Section 901:10-4-05(F) establishes inspection provisions for general operating permits. Although some requirements in these sections of OAC are similar, there are apparent differences with respect to ODA’s authority to conduct inspections, investigations and gather information.

c.) Section 901:10-5-02(B)(3) requires advance notice to owner/operator prior to inspections, and 901:10-3-10(H) requires a State inspector to comply with the facility’s biosecurity procedures. Further discussion is needed regarding whether ODA retains authority to conduct unannounced inspections, including inspections of construction activity being conducted under a NPDES permit, and ODA’s procedures and policies to determine when advance notice of inspections to the owner or operator will or will not be provided.

d.) Section 901:10-5-04 establishes requirements for civil penalties. Section 901:10-5-04(A) defines the term “facility” for purposes of 901:10-5-04 to mean CAFOs, CAFFs and major CAFFs. This definition appears to limit the requirements for civil penalties established at 901:10-5-04(F) and (G) to only violations of Chapter 903 by CAFOs, CAFFs and major CAFFs.

e.) Further discussion is needed on whether ODA will provide written public notices in certain situations, such as: when public complaints are dismissed (see 901:10-5-01(E) in comparison to 123.27(d)(2)(i)); to a complainant after ODA makes a non-compliance decision at a facility (see 901:10-5-01(F) in comparison to 123.27(d)(2)(i)); and for proposed settlements of penalty or other enforcement actions (see language for the content of public notices in 901:10-6-02(A) in comparison to 123.27(d)(2)(iii)).

f.) Pursuant to 903.17(A), ODA is authorized to assess a civil penalty and propose requirements for corrective actions against an owner or operator of an animal feeding operation. Pursuant to 903.17(E) ODA is authorized to impose an administrative penalty against an owner or operator of an animal feeding operation. Further discussion is needed to determine if ODA has the authority to assess civil penalties against an operator of a construction site that is discharging stormwater when that operator is not the owner or operator of an animal feeding operation.

g.) Chapter 903.12 and 901:10-5-02 set forth requirements regarding entry to premises and access to records. Further discussion is needed to determine if the AG has statutory authority to seek penalties for violations of 903.12 and 901:10-5-02 against a non-permittee or non-applicant who refuses access. See 123.27(a)(3)(i) (judicial penalties for violation of duty to allow inspections, entry, or monitoring).

h.) Further discussion is needed on whether Ohio’s legal authorities provide for the judicial assessment of per-day civil penalties for violations other than violations of the Director’s orders for corrective action and assessment of (administrative) civil penalties. See 903.17(D)(2) and 903.17(B) in comparison with 123.27(a)(3)(i) (judicial per-day penalties for violations of permit conditions, filing requirements, inspection and entry duties, and regulations or orders of the director.)

i.) Section 903.09(F) and 3745.04 to 3745.06 of the Ohio Revised Code set forth procedures to appeal to the Environmental Review Appeals Commission (ERAC) and review in state court. Further discussion is needed to determine if adversely affected parties shall exhaust administrative remedies before they have the right to seek judicial review.

j.) Further discussion is needed on whether the conditions for the assessment of (presumably administrative) civil penalties in 903.17(A), particularly 903.17(A)(2) which requires an inspection to determine if the facility is still in noncompliance, apply to the judicial penalty authorities in 903.17(D).

6. E-reporting: Based on discussions between EPA and Ohio at a March 21, 2019 meeting, it is EPA’s understanding that Ohio EPA will retain responsibility for maintaining a management information system for the NPDES program, including the portions of the NPDES program proposed for transfer to ODA, which supports the compliance evaluation activities required by Part 123 and complies with Parts

3 and 127. Further discussion is needed to ensure EPA understands ODA's conformance with federal reporting requirements.

7. Other topics:

a.) According to the AGS, pp. 103-105 and p. 112, 40 CFR 122.44, 122.46, 122.47, 122.48 and Part 132 have been incorporated by reference into the administrative code. As discussed in EPA's program guidance² and consistent with the requirements for a state program set forth at 123.21 and 123.25, the Memorandum of Agreement (MOA) and the program description must fully address the permitting procedures which the state intends to use and provide a description of the mechanism for keeping any incorporations by reference current and consistent with future changes in federal requirements. Several of the specific incorporations of federal rules in the text of 901:10 provide dates that appear to be inconsistent with the definition of 40 CFR as it is defined at 901:10-1-01(QQQQ) which references the July 1, 2010 version of the Federal Code of Regulations. Further discussion is needed to address how Ohio will maintain current incorporations by reference.

b.) Section 901:10-3-01(F) incorporates Part 132 by reference. Section 901:10-3-08 includes comparable state requirements to some of the federal requirements set forth in Part 132 but not all. Further discussion is needed regarding ODA's legal authority, resources, and procedures for the administration of Part 132.

c.) Further discussion is needed regarding how the permit actions identified in ORC³ and OAC⁴ conform to the federal permit actions to modify, revoke and reissue, or terminate established in 124.5(a).

d.) Further discussion is needed regarding the consistency of 901:10-6-04(D) with Ohio EPA's policy for determining "significant degree of public interest."

e.) Further discussion is needed regarding possible incorrect citations included in Ohio Administrative Code.

f.) Further discussion is needed regarding the MOA.

¹ 903.10(E)(12) of the Ohio Revised Code provides that the director may adopt rules that establish a definition of "general NPDES permit" and a definition of "individual NPDES permit". EPA did not find any such definitions in Chapter 901:10 of the Ohio Administrative Code.

² NPDES State Program Guidance for Development and Review of State Program Applications and Evaluation of State Legal Authorities, Volume One, Office of Water, July 29, 1986.

³ More specifically, 903.08(B)(1), 903.08(L), 903.10(E)(11) and 903.10(F).

⁴ More specifically, 901:10-1-03(C), 901:10-3-10(B), 901:10-3-10(C), 901:10-3-10(D), 901:10-3-10(I), 901:10-4-01(E), 901:10-5-01(G), 901:10-6-01(A)(5), 901:10-6-01(B)(3), 901:10-6-02(A), 901:10-6-04(A), 901:10-6-04(C), and 901:10-6-04(J)(1).